

Professing Criminal Law

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THE SANCTITY OF LIFE AND THE CRIMINAL LAW: THE LEGACY OF GLANVILLE WILLIAMS. (Dennis J. Baker & Jeremy Horder eds., Cambridge University Press, 2013)

The title for this review of a volume of essays written to commemorate the criminal law scholarship of the late Glanville Williams (1911–1997) is the one chosen by Tony Smith for the concluding chapter of the volume. The title given to the collection—*The Sanctity of Life and the Criminal Law*—does not fully reflect the content of the book. Some of the essays deal with matters relating directly to the sanctity of life, but the majority of the chapters revisit other topics in the criminal law which were of interest to Williams. These essays, admiring yet sometimes critical of Williams' scholarship, prompt thoughts about the nature and purpose of the academic study of Anglo-American criminal law at the present time, thoughts to be aired briefly at the end of this review.

Before that and other things, something should be said about the stature that Williams attained among practicing and academic English lawyers. The final post that he held for many years up to his retirement was Rouse Ball Professor of English Law at the University of Cambridge. The broad designation of this chair shows the scholarly interests and achievements of Williams went far beyond the criminal law. Had he not written anything at all about criminal law, he would still have been a highly prominent legal academic on account of major publications in the fields of contract, torts, public law, and jurisprudence.¹ Yet it is his work in criminal law that is the most enduring part of his legacy, above all, *Criminal Law: The General Part*.²

Before the publication of *The General Part*, the study and the practice of criminal law in England did not carry much intellectual kudos. In the words of the legal historian Milsom:

The miserable history of crime in England can be shortly told. Nothing worth-while was created. . . . The kind of discussion by which law develops as an intellectual system is a luxury in the context of preserving

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¹ The biographical note of Peter Glazebrook, prepared for the proceedings of the British Academy, is reproduced as chapter one of the volume under review, and provides a very well informed appraisal of Glanville Williams, the man and his work. (P. 1.)

² GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* (2d ed. 1961).

elementary order. . . . The criminal law became segregated [from the rest of the common law] as one of the dirty jobs for society.³

Milsom's assessment was too severe, adopting the dismissive tone that some legal scholars still use when discussing the criminal law. But there is far more than a grain of truth in his appraisal. At the beginning of the twentieth century, the sources of the substantive criminal law were scanty. The proceedings of the Star Chamber left an account of the origins and development of incitement, conspiracy and attempt.⁴ The records of jury trials left only details of indictment, general issue and verdict, although a judge, at his discretion, could reserve a point of law for a ruling from a bench of judges. Legal representation was available to defendants in felony trials only as of 1836.⁵ Appeals from a jury verdict were not provided for until 1907.⁶ Before then, appeals were allowed from convictions only for some summary offences. Unsurprisingly, there were few landmark cases until well into the last century, and the substantive criminal law, such as it was, consisted of a patchwork of legislation, some of considerable vintage, and the meager body of appellate and reserved decisions. To some extent, these primary sources were supplemented by some very influential extrajudicial writing about the criminal law.⁷

In preparing his *magnum opus*, Williams studied in depth the criminal laws of Anglophone jurisdictions, putting the cases and statutory materials worthy of analysis in the best light and under appropriate rubrics, while making sharp criticisms and formulating reform proposals for aspects of the criminal law found unfit for purpose. For England and Wales, he produced a corpus of law to be critiqued, developed, and improved. Though grounded in the sources, the *General Part* was a creative work of doctrinal scholarship of the highest order. Despite the efforts of Williams and other scholars, Milsom concluded his historical survey of the criminal law with a glance at the present day (1982): "Only in very recent years has much effort been made in England to systematize the criminal law at all levels, and to state it in terms more appropriate than those left by medieval accident."⁸ This comment still has some sting even now in the light of the failure of England and Wales to produce a criminal code. Yet, even at the time, his comment gave less than their due to the growing sophistication of appellate judgments on the substantive criminal law, and the growth of doctrinal and theoretical scholarship in that field. Things have improved significantly in these regards since then.

³ S. F. C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 403 (2d ed. 1981).

⁴ WILLIAMS, *supra* note 2, at 663.

⁵ Prisoners' Counsel Act, 1836, 6 & 7 Will. 4, c. 144 (U.K.).

⁶ Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, §§ 3, 4 (U.K.).

⁷ There is a significant literature on criminal law from the institutional writers Coke, Hale, Hawkins, Foster, and East, and from Blackstone and Stephen. See (Pp. 330-32.)

⁸ MILSOM, *supra* note 3, at 428.

Williams' work in the substantive criminal law remains a valuable point of reference in the development of doctrine in criminal law.

Although a doctrinal scholar of the first rank, scholarship for the sake of scholarship was not his primary goal. Above all, he wanted to make the criminal law useful and humane as from a utilitarian perspective. After fulfilling the obligations of his chair, practical engagement with the process of legal reform was his first priority. (P. 330.) Though he achieved some successes in influencing and shaping changes in the criminal law of England and Wales, it is his scholarship that leaves the greatest mark. His current citation rate in appellate courts provokes admiration and envy from those, such as your reviewer, who are still toiling in the vineyard to less effect than Williams achieves posthumously.⁹

It is not possible to do full justice to all of the contributors to the volume. The editors are to be congratulated on the prowess of the team of scholars recruited. All of the essays can be read with profit by anyone with an interest in Anglo-American criminal law. What follows is an attempt to capture and engage with the major points of criticism concerning aspects of Williams' scholarship that arise in these essays.

I. THE GENERAL PART

Although the break is not completely clean, many of the essays can be divided into those dealing with aspects of what is often called the general part of the criminal law and those where the predominate concern is with the sanctity of life. This section will discuss the general part themes. It will be convenient to begin with two essays which fall within the general part as Williams conceived it, but which are more self-contained than other contributions.

A. Mental Disorder and Sexual Consent

John Stanton-Ife tackles a difficult issue: the legal regulation of the sex lives of mentally disordered persons. The immediate concern is to protect a vulnerable class of persons from harm and exploitation, but, in doing so, it is all too easy to eliminate any form of sexual pleasure from the lives of persons who may possess a full libido. An overprotective regime may limit their chances of forming affectionate, long-term relationships and over-regiment their daily lives. English law cleaves closely to protecting mentally disordered persons, leaving little scope for sexual contact. It deploys the concept of "refusal-incapable" persons.¹⁰ V will be refusal-incapable if she lacks a sufficient understanding of the nature of the sexual contact or the reasonably foreseeable consequences of the contact.¹¹ Even

⁹ Joshua Dressler gives details of Williams' citation count. (P. 138, n.58.)

¹⁰ Sexual Offences Act, 2003, c. 42, § 30 (U.K.).

¹¹ *Id.* at § 30(2)(a).

if these conditions do not apply, V will remain in the class if she is unable to communicate her competent choice to D.¹² Unsurprisingly, Stanton-Ife takes the view that this provision is likely to conflict with the best interests of mentally disordered persons, a view which would, as Stanton-Ife demonstrates, be shared by Williams. (Pp. 204–206.) Stanton-Ife’s insightful and humane discussion of the matters to be resolved when mapping, respectively, the zones of protection and choice for the severely mentally disordered makes a strong case that the current law unduly restricts sexual contact. Yet, because his philosophically informed analysis is so sensitive to all the issues in play, it also demonstrates how difficult it is to formulate a balanced yet forensically usable test for the minimum conditions of consent on the part of persons whose lack of understanding of the nature of sexual contact, and its consequences may be radical. (Pp. 225–229.)

The restrictive condition of English law on consent and mentally disordered persons was influenced by the unreported trial case of *Jenkins*. (P. 207.) D, a care worker in a residential accommodation for learning disabled persons, had sexual intercourse with V, a woman in his care, who had a mental age of three. D was acquitted of rape on a jury direction that instructed that the arousal of “animal instinct” could make for consent.¹³ While Stanton-Ife fully understands the reasons for the adverse reaction to D’s acquittal, he would not deny, even to persons as learning disabled as V, the opportunity for sexual contact, though not, of course, in circumstances of exploitation. Whether for persons such as V this can be achieved by formulating a test that will reliably indicate when, in some tenable usage of the word consent, there was indeed consent to some token of sexual contact, is a considerable challenge.

B. Preventative Orders and the Rule of Law

Andrew Ashworth’s chapter revisits an article of Williams’ where he used his critical skills on the continued misuse of the jurisdiction vested in criminal courts in England and Wales to bind over a defendant, witness, or complainant in a criminal case to keep the peace.¹⁴ The court must have reason to believe that the person against whom the binding-over order is made may cause a breach of the peace, unless constrained. In that case, it can order the person to pay over a sum of

¹² *Id.* at § 30(2)(b).

¹³ Applying *R v. Fletcher*, (1859) Bell CC 63 (U.K.).

¹⁴ Glanville Williams, *Preventative Justice and the Rule of Law*, 16 M.L.R. 417 (1953). At the time this article was published, a binding over order could oblige the subject to be of good behavior and/or to keep the peace. The power to bind over to be of good behavior was found to be too uncertain in scope to comply with Article 10 of the European Convention for the Protection of Human Rights. *Hashman v. U. K.*, 30 Eur. Ct. H. R. 241, 257 (1999). The origins of the power to bind over are to be found in the common law and the Justices of the Peace Act 1361 and supplemented in various statutes but principally the Magistrates’ Court Act 1980. For further detail see Law Com. No. 222, *Criminal Law: Binding Over* (Cm 2439, London: HMSO, 1994) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271993/2439.pdf.

money (enter a recognizance) to be forfeited should he cause at some future time a breach of the peace. Should the person subject to the order refuse to pay the sum demanded, immediate imprisonment can follow, to a maximum of twelve months.

On revisiting Williams' critique of this ancient yet singular jurisdiction, Ashworth finds more bad news than good news. Although Williams was not an outright abolitionist of the power to bind over (he allowed a limited role in respect of non-defendants), the power of his critique was in large part responsible for the Law Commission for England and Wales concluding that binding over had no place in a modern criminal justice system. (P. 46.) But the United Kingdom Government was persuaded by criminal justice professionals that the power to bind over was too useful, too time and cost effective, to be let go. Improvements were made: when binding to keep the peace, the court must identify the behavior from which D must refrain, and there are now rules on evidence, burden of proof, and calculating the amount of the recognizance. (P. 47.) Yet, two of the most fundamental rule-of-law objections that Williams raised are un-remedied. The amount payable by way of recognizance may exceed the maximum fine for any offence charged; English courts have managed to persuade themselves that this may be a warranted response to persistent offending. (Pp. 64–65.) Most dismaying of all is that imprisonment for up to twelve months continues to be the sanction for refusing to be subject to an order, when the breach of the order leads only to the forfeit of the payment on accepting the order. (Pp. 65–67.)

Milsom's pejorative phrase "medieval accidents" referenced earlier seems particularly on point for a court order that goes back to the Justices of the Peace Act 1361. But the idea of bypassing criminal trials by quick fix preventive orders flourishes in contemporary England and Wales. The most wide-ranging of these variations on a medieval theme is the anti-social behavior order [ASBO]¹⁵. The process starts with civil process; the court must be persuaded that D has acted in a manner likely to cause harassment, alarm or distress to one or more other persons. Whereupon, an order can be made (the ASBO) prohibiting D from doing anything identified in the order for the next two years. None of the matters prohibited need be a criminal offense. If the order is breached, that in itself is a criminal offense punishable with a maximum of five years imprisonment. By this process conduct which does not contravene the terms of any nominate offense is none the less a crime. Should the terms of the order be breached by conduct that is criminal (say, a minor assault of the kind that can only be tried summarily), the sentence handed down is guided by the five year maximum rather than maximum penalty for summary assault.

Ashworth's unanswerable critique of the ASBO and like orders (pp.57–62 and references) is one of the salient reasons why, at the time of writing, they are under legislative review.

¹⁵ ASBOs were introduced by the Crime and Disorder Act, 1998, c. 37 (U.K.). At the time of writing, these orders are under legislative review and the account of the law in the text may be superseded by the time of publication.

C. *What is the General Part of the Criminal Law?*

The preface to the second edition of Williams' *Criminal Law: The General Part* opens as follows:

This book is concerned to search out the general rules of the criminal law, *i.e.*, those applying to more than one crime. The great proliferation of criminal offences by the legislature means that many crimes are not fully covered by judicial interpretation; but all are governed by certain general principles, which are conveniently described on the Continent as the "general part" of the law. By bringing together the authorities on such concepts as knowledge, intent to defraud, and claim of right, the root principles are thrown into relief, and the attention of the practitioner is directed to relevant authorities that might be decided under different statutes from the one with which he is immediately concerned.¹⁶

This passage, which is the totality of Williams' account of what the general part consists of, offers no theory, nor even a description of the general part. To make the badge of entry to the general part a rule that applies to more than one offense will not do as a theory or description of the general part.¹⁷ It would be heavy-handed, however, to subject to critique the contents of a preface. The point of interest is that these cursory remarks, remaindered to a preface, demonstrate Williams' lack of interest in theoretical discourse. Though not a theorist, Williams was a jurispudent,¹⁸ a perspicuous user of juristic concepts and categories, a learning that inflected his work on substantive law. He created a general part for England and Wales by virtue of writing about elements of the general part.¹⁹ He went straight in to doing that (chapter one is entitled, *The Criminal Act*) without spending too much time pondering the content of his book.

Michael Moore's approach to scoping the content of the general part could not be more different. His rich and layered theoretical essay on the "specialness" of the general part concludes that Anglo-American criminal law's general part consists of four theories of liability, each made up of the same four parts. (P. 92.) By a process of generalization and abstraction of the grounds for liability for the wrongs found in the special part (considered in more detail below), Moore distills

¹⁶ WILLIAMS, *supra* note 2, at v.

¹⁷ Michael Moore convincingly dismisses any attempt to fashion a general part by picking out the general from the particular. (Pp. 69–71.)

¹⁸ See Peter Glazebrook. (Pp. 7–8.)

¹⁹ None of the twenty-three chapters seem awkwardly placed in a book about the general part. Moore objects that the content is too heterogeneous to nest under a properly unified conception of the general part. (P. 70.) It will be argued below that the general part is heterogeneous, and resists capture under a unified theory of the general part, at least in England and Wales.

the content of the general part, enabling the four parts of each of the four theories to be displayed by way of a four square matrix. These are drawn up for the theory of liability that leads to conviction as a principal offender for a completed crime, and then for liability as a principal for an inchoate crime, moving on to liability as an accomplice for completed and inchoate crimes, and finally, liability for conspiracy. This last theory of liability allows coverage of a broader swathe of conduct of an inchoate or complicitous kind than is allowed for by those forms of liability in their own right. (Pp. 92–101.)

A content neutral scrutiny of the special part lays the ground for the general part. For Moore, the general part is a descriptive theory of the special part. (P. 73.) The special part is studied in order to identify the patterns and forms of liability for specific crimes. Once identified, they are subjected to generalization, refinement and abstraction. As the special part is concerned with responsibility for wrongs across multifarious forms of human conduct, the process of generalization and abstraction engages with the grounds of moral responsibility for many different kinds of prima-facie wrongdoing. When examined in the round, a lot of common ground in the terms of responsibility for disparate wrongs is revealed, from which an overarching theory of responsibility can be constructed. (P. 95.) This overarching theory determines the content of the four theories of liability to be found in general part. This theory of responsibility will not always correspond with aspects of the special part; there will be some cases of criminal liability which are unwarranted when tested against the grounds of liability and exemption endorsed by the general part. If there is no good reason why these tokens of liability should be non-compliant with the terms of liability prescribed by the general part, then the general part, as an integral part of the criminal law, can be deployed to review and revise aspects of the special part. (P. 80.)

When Moore's four part matrices are consulted, one finds a snug fit between the conceptions of wrongdoing, culpability, justification and excuse derived from retributivist theory and the content of his general part. His general part is not put forward as a normative construct deduced from retributivism but is presented as derived from theorizing the actual content of the special part. Focusing on Moore's culpability requirements, for each of the four forms of liability, there must be intent with respect to result elements of the *actus reus*, plus belief as to circumstance elements, or knowledge of such elements, or belief of a risk of such elements, or existence of a risk of such elements a reasonable person would have known about. Moore allows that none of these forms of culpability is required for "minor violations." It would seem that, for Moore, the thousands of strict liability offenses to be found in state and federal criminal law come within the scope of minor violations: "offences of strict liability are not real crimes." (P. 89.) Accordingly, the thousands of crimes in the special part which dispense with proof of any form of culpability are not, in substance, at variance with the insistence in his version of the general part that requires some form of culpability as a condition for criminal liability.

In the case of England and Wales, bracketing strict liability as not really part of the criminal law would be implausible. For that jurisdiction, Williams was entirely correct to include a chapter on strict liability in his book on the general part.²⁰ Even in the regulatory context, many strict liability offenses carry sentences of imprisonment. Strict liability is not confined to the regulatory context but has been used as the standard for very serious offenses, such as rape of a child²¹ and possession of a firearm.²² For the most common form of non-vehicular homicide—unlawful act manslaughter—there is no culpability requirement, merely a causal requirement, for the death element of the offense.²³ There is a form of vehicular homicide that is strict all the way down.²⁴ Any survey of the criminal law of England and Wales also has to include its terrorism legislation, now voluminous and permanent. Liability for terrorism offenses can be incurred for conduct so remote from terrorist acts that any talk of culpable wrongdoing becomes extremely forced.²⁵ On occasion, English law not only dispenses with

²⁰ See WILLIAMS, *supra* note 2, at 215.

²¹ Sexual Offences Act, 2003, c. 42, § 5 (U.K.). In *R v. G*, [2008] UKHL 37 (appeal taken from Eng.), the House of Lords confirmed a conviction for rape of a child against D, a fifteen year old boy who reasonably believed V, his twelve year old girlfriend, to be fifteen.

²² Fire Arms Act, 1968, c. 27, §§ 1, 5 (U.K.) (as amended). In the conjoined appeal of *R v. Rehman*, [2005] EWCA (Crim) 2056, [5], [21], [23] (Eng.), the two defendants who, in the words of the court of appeal, were of “positively good character,” appealed against sentences of five years imprisonment for the strict liability offense of unlawful possession of a firearm, the minimum term fixed by law. It was accepted for both defendants at trial that they had no unlawful intentions regarding any use of the firearm possessed. *Id.* at [19], [28]. Rehman’s sentence was reduced to one year based on “exceptional circumstances,” which displaced the minimum term, namely the fact that he had good reason to think that the item possessed was not a firearm. *Id.* at [30]–[31]. Wood’s five-year sentence was upheld; he had taken possession of a sawn-off shotgun from his father, twenty-one years previously, put it in his attic, and left it there. *Id.* at [25], [32].

²³ There is a long-standing line of authority that the predicate offense need not, *ex ante*, give rise to any discernible risk of serious harm. For a recent and striking example, see *R v. JM*, [2012] EWCA (Crim) 2293 (Eng.).

²⁴ Section 3ZB of the Road Traffic Act 1988 creates a homicide offense of causing death while driving without a license, or while disqualified, or without insurance. All three predicate offenses are offenses of strict liability; particularly in the matter of insurance cover, motorists may be without coverage through no fault of their own and with no reason to be aware of the lack of coverage. There need only be a causal connection between the driving and the death, a requirement, until recently, given the widest interpretation. See G.R. Sullivan & A.P. Simester, *Causation without Limits: Causing Death While Driving Without a Licence, While Disqualified or Without Insurance*, 2012 CRIM. L. REV. 753, 753 (2012). This offense was recently scrutinized by the Supreme Court (UK) in *R v. Hughes* [2013] UKSC 56 [36] (appeal taken from Eng.), where it was ruled that the driving had to be at fault if it was to be regarded as a cause of death, a ruling to some extent welcome, but unsettling for standard causal doctrine. A.P. Simester & G. R. Sullivan, *Causation as Fault*, 73 CAMBRIDGE L.J. 14, 14–15 (2014).

²⁵ In *Khan v. R*, [2013] EWCA (Crim) 468, [48], [79], [90] (Eng.), and others, the court of appeal handed down very long sentences to defendants for conduct which, with one exception, was utterly remote from any act of terrorist violence. The one exception was downloading instructions about pipe bombs. In *R v. Gul*, [2013] UKSC 64, [28]–[37], [61] (appeal taken from Eng.), the

culpability but also with what should be the very foundation stone of any form of criminal liability, namely some act, omission or state of affairs attributable to a voluntary exercise of D's agency, or some voluntary omission on the part of D which would have prevented the occurrence of the proscribed event or state of affairs.²⁶

One could go on in this vein, but instead, something will be said about punishment for crimes in England and Wales. For Moore, a theory of the general part does not include a theory of punishment as a theory of punishment goes to the totality of the criminal law and not just to the general part. (P. 72.) Conceptually, one can separate the conditions which justify in retributivist terms D's conviction for an offense and thereby render him eligible for punishment, from what sanction makes for a just punishment for the offense. Yet there would be a lack of concordance at the level of the criminal law in its totality if the restraints of retributive justice were scrupulously observed up to the point of conviction, and then frequently discarded at the sentencing stage. For a retributivist *tout court*, that would be half a loaf.²⁷ In England, the aims of sentencing are set in statutory form and consist of punishment, crime reduction, reform and rehabilitation, public protection and reparation.²⁸ The legislation makes no attempt to reconcile the irreconcilable by reference to any overarching purpose. This reflects the fact that convictions and punishments unjustifiable in retributivist theory abound in England and Wales. Any theory of the general part rendered in retributivist terms for that jurisdiction must be by way of normative critique; it cannot be based on a descriptive theory of the special part.

D. Justification and Excuse

For some considerable time, a number of Anglophone criminal law scholars have been arguing the importance of the distinction between justification and

Supreme Court gave the widest interpretation possible for the meaning of terrorism in terrorist legislation, a reading which encompasses persons of democratic aspirations using direct means to oppose tyranny.

²⁶ Section 441 of the Education Act, 1996, c. 56, § 441 (U.K.) makes it an offense to be a parent of a child of compulsory school age who is not attending school regularly. There are thousands of prosecutions for this offense each year, frequently involving convictions of blameless parents made liable through the free agency of their teenage children. G.R. Sullivan, *Parents and Their Truanting Children: An English Lesson in Liability Without Responsibility*, 12 OTAGO L. REV. 285, 287–88 (2010).

²⁷ For "mixed" theorists such as H.L.A. Hart, half a loaf is all that is wanted. H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1 (1968); H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY, *supra*, at 158.

²⁸ Criminal Justice Act, 2003, c. 44, § 142 (U.K.). The mandatory life sentence for murder and the provisions for passing sentences for public protection result in many sentences disproportionate to the gravity of the offense.

excuse. In his vivid and illuminating revisitation of Lord Coleridge's judgment in *Dudley and Stephens*,²⁹ Joshua Dressler questions the convictions for murder and ponders whether things might have turned out differently if the right question had been asked. The question was not whether the killing of the cabin boy was justified and to be endorsed as a guiding rule of conduct for persons unfortunate enough to find themselves placed in similar circumstances. What should have been the focus of attention of the court was the extremity of the circumstances. Stoical resistance to the temptation to survive by way of killing an innocent non-threatening person should draw unstinting praise. It does not follow that succumbing to the temptation should attract unrelenting blame. The question that should have been asked is whether the killing of the cabin boy was done with the culpability warranting a conviction for murder. For Dressler, the answer for the very dire circumstances of the case is no. Because the circumstances were so extreme, even a deliberate killing driven by these exigencies and necessary for the survival of the three defendants could be excused. (Pp. 139–145.)

Dressler references the criticisms made by Williams of the judgment of Lord Coleridge and agrees with some of his points of detail. (P. 134.) But, for Dressler, the secular-utilitarian reasoning that underpins Williams' conclusion that the defendants should have been acquitted hits the wrong note. Killing the cabin boy cannot be convincingly justified in consequentialist terms because the wrong involved in killing an innocent person precludes for Kantian reasons any consequentialist attempt to justify killing an innocent, non-threatening person. Only an in-the-round moral appraisal informed by the difference between justification and excuse can acknowledge the wrong, yet still withhold conviction and punishment on the ground of attenuated culpability.

It is questionable, however, whether even deontologists who take the justification/excuse distinction seriously will agree among themselves about the decision in *Dudley and Stephens*. There are codes of morality that take an intentional killing of an innocent, non-threatening person to be a moral wrong of such gravity as to be inexcusable, let alone justifiable.³⁰ And there will be differences in the consequentialist camp. As Dressler notes, some rule-utilitarians would advocate an intransigent law of murder as the most cost-effective way of cutting the murder rate across the board, however harsh the verdicts in individual cases. (P. 141.) Most act-utilitarians such as Williams would agree that the decision was wrong, but some might disagree as to the details of the calculus and

²⁹ R v. *Dudley and Stephens*, (1884) 14 Q.B.D. 273 (U.K.).

³⁰ In substance, this is the position taken by English law in its consistent refusal to allow the defense of duress to murder. Although defense submissions have not made reference to scholarly accounts of the excuse-justification distinction, the defense has long been characterized in England as a "concession to human frailty." R v. *Howe*, [1987] 1 A.C. 417, 432 (H.L.) (appeal taken from Eng.). See also R v. *Hasan*, [2005] 2 A.C. 467 (H.L.) (appeal taken from Eng.). But in cases where one innocent life is pitted against another innocent life, a duty of self-sacrifice is a consistent theme in the jurisprudence, whatever the weight of circumstances. The leading case is *Howe*, *supra*.

think there was insufficient clarity about the benefits to be achieved to warrant a disapplication of the law of murder at the time the killing was done. There is one certainty though: *Dudley & Stephens* will be discussed in class for many decades yet.

Paul Robinson marks the failure of Williams to heed the justification/excuse distinction as one of the four distinctions that he failed to make in his examination of the interrelation between criminal law doctrines.³¹ Robinson is perhaps the leading advocate for the formal recognition of this distinction in the daily workings of the criminal law. If D is excused for a wrong rather than found to have done the right thing, the public terms of the acquittal should record that his conduct was wrong, and breached the terms of the law, but not in circumstances requiring a punitive response. (Pp. 110–13.) A public record sending this message might, for instance, have diffused some of the public anger aroused by the acquittal of the police officers responsible for the death of Rodney King. (P. 111.) An acquittal on the grounds of excuse need not leave D unsupervised: the court should be given jurisdiction to make D subject to orders in the interest of public safety when necessary. Robinson's clear-cut take on justification/excuse divide would be helpful in court room settings. For him, justification is based on the external facts. If the container that D picked up contained a bomb due to explode on the crowded beach, it does not matter if D thought he was making off with something of value he could use or sell. If D's act is of beneficial impact in terms of the interests that law exists to protect, then his act is justified whatever his motivation. Justified conduct must be allowed its head: it cannot be interfered with, and third parties are permitted to assist the justified actor in what would otherwise be criminal conduct.

There is no doubt that the justification/excuse divide is embedded in daily life. Frequently, people say things like, "What can you expect? He's had such a hard time recently. But I wish he had not done it," or "She refused to do it. Someone needed to take a stand. I hope she keeps her job." But, employing the distinction as a formal binary divide, to be used as a matter of record, will be difficult. Self-defense is conceived of by many criminal law theorists as a quintessential justification, but it has always contained an element of excusatory leeway: "A person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action."³² In a remarkable and lamentable recent legislative change, English law now provides that a householder defending himself and others in his household will be deemed to have exercised his statutory right to use "such force as is reasonable in the circumstances"³³ unless he used force that was

³¹ The other distinctions that, for Robinson, should have been made by Williams, were to mark those defenses which exempt from liability where D satisfies the elements of the offense definition, to mark the doctrines of imputation that impose liability on D when he does not satisfy all the elements of the offense definition, and to distinguish between *ex ante* rules of conduct and *ex post* rules of adjudication. (P. 109.)

³² *Palmer v. R.*, [1971] 1 A.C. 814, 832 (P.C.) (Lord Morris) (appeal taken from Jam.).

³³ Criminal Law Act, 1967, c. 58, § 3 (U.K.).

“grossly disproportionate.”³⁴ While ill-advised legislation can deem disproportionate force short of grossly disproportionate force to be reasonable force, no legal alchemy can make disproportionate force morally justified force. If England and Wales were to adopt the qualified acquittal recommended by Robinson, it would have the unenviable task of sorting acquittals based on self-defense into those that were justified and those that were not, although all acquittals on this ground would fall within the statutory terms of the defense.

Duress is conceived of as the quintessential excuse. Suppose D says to P (and means what he says), “Tell me the code or I will shoot you.” What P should be permitted by law to do next depends very much on why D wants the code. If it is entry into a nuclear facility, it might not be unreasonable to expect P to die at his post. If it is the code for a bank safe, I, for one, would want P to return safely home to his family, even at the expense of the bank. Should he be given some lesser form of acquittal, indicative of a wish that he should do better next time?

It may be that these difficulties of application are not insurmountable. Yet there are deeper issues regarding the very conception of a justification. D, a police officer, receives in his earpiece a message from a superior that V, a person sitting in a London tube train, is a terrorist with a concealed explosive device. V is no such person, just a passenger. Yet, on the information D was given, and considering his place in the police command structure, complying with the order to shoot to kill V was his only operational option.³⁵ Yet if it is claimed that D was justified in shooting V, for Robinson it would follow that the innocent V can offer no lawful resistance to being shot. This is one reason why Robinson would say that D’s killing of V can only be excused, whereas if it had turned out that V had been able to save his life by killing D, that killing would have been justified because the external facts were on V’s side.

For George Fletcher, the scholar who did so much to bring the excuse/justification distinction into Anglo-American criminal law scholarship, the idea that all questions of intent and motivation should be stripped out of the question of whether D was justified is a “heresy.”³⁶ The best reason for following Robinson is that, by allowing the external facts to do the talking, there is an economical method of sorting out definitively, who is justified and who is excused. In the case of the tube train shooting, the officer must look to be excused not

³⁴ Crime and Courts Act, 2013, c. 22, § 43 (U.K.).

³⁵ The description of the tube train shooting is based on the police account of why the innocent Jean Charles de Menezes was killed by police fire. See Jenny Percival, *Orders Given to Police Who Shot Jean Charles de Menezes Were ‘Ambiguous’*, THE GUARDIAN, (Nov. 5, 2008, 7:28 PM), <http://www.theguardian.com/uk/2008/nov/05/de-menezes-pathologist-inquest>. There have been no criminal proceedings against the instructing officer or the officer who shot de Menezes. *Id.* The police account is disputed by the family and supporters of the innocent man. See Transcript, DeMenezes Inquest (October 20, 2008), available at http://www.julyseventh.co.uk/j7-jean-charles-de-menezes-inquest/de-menezes-inquest-transcripts/oct_20.pdf.

³⁶ It seems that Fletcher thought Robinson sent Williams on the wrong path in this matter when Robinson studied at Cambridge, but it seems Williams got there by himself. (Pp. 40–42.)

justified, and the innocent V retained all his rights, although in practical terms he was not able to exercise them. For Robinson, to claim that the officer was justified in shooting the innocent man, and that, had he had the means and opportunity, the innocent man could have defended himself against justified force, is muddle-headed. But is it not the case that police officers should do what is presumptively the right thing if on the best risk assessment available it seemed the right thing? A legal system may wish to give its officials this degree of latitude, but not at the expense of denying innocent persons the right to defend themselves. A finding that each party to a bilateral shoot-out was justified, is not a logical contradiction and may make for better if more complicated justice than Robinson's fact of the matter conception of justification.

E. Culpability

Williams took a subjectivist approach to *mens rea*, believing that, in the main, the culpability for offenses should be expressed in terms of intention, knowledge, recklessness, and the like. Usually, this is a fairly reliable indicator of a person with retributivist leanings, but not in the case of Williams. As a thorough-going utilitarian, he had no time for retribution. He, of course, allowed punishment for the sake of deterrence but was no zealot; regarding belief in the threat of punishment as an influence on human conduct as "a matter of faith rather than of proved scientific fact."³⁷ He was very skeptical about the deterrent effect of laws punishing tokens of negligent conduct: "there is no department in which this faith is less firmly grounded than that of negligence."³⁸

Andrew Simester believes that the criminal punishment of some tokens of negligence is morally warranted. For Simester, the punishment of negligent conduct cannot be squared with standard versions of choice theory and capacity theory. The accommodation of negligence as a form of culpability requires, in his words, "a disintegrated theory of culpability." An example he gives of D, left in charge of a young child on a beach, who fails to prevent the child from drowning because he is giving all his attention to a radio broadcast, makes a strong intuitive case for criminal liability and punishment. (P. 194.) The case would be even stronger if D had seen the child was in difficulty but chose to keep listening. But the case is strong as it stands even though it would be a stretch to say that it was his choice to allow the child to die.

The most obvious theory supportive of the punishment of D would be H.L.A. Hart's capacity theory, which supplements choice theory. One would ask whether D was a person with normal mental and physical capacities. Then one would ask whether a reasonable person with normal capacities would have kept an eye on the child. For Simester, this is not enough, as "it fails to demonstrate in positive terms

³⁷ WILLIAMS, *supra* note 2, at 122.

³⁸ *Id.*

why negligence can be a ground of culpability.” (P. 185.) He finds what is needed in what he terms a (thin) moral character flaw theory. (P. 193.) It is thin in the sense that it does not rest on any in-depth, time-expansive examination of the character of D. Just as with choice and capacity theory, the culpability arises from an episode of conduct. What is required is that, during that episode, D was not merely inadvertent when he had the capacity to pay attention, but that his failure to do so reflects badly on his character—shows him to be a person with wrong values.

Simester demonstrates very well why negligent conduct taken as a category encompasses disparate forms of failure. Even the grossest episodes of negligence may not evince the kind of moral gravity a serious criminal offense arguably should require. D may be the anesthetist from Hell, but his shortcomings may be a tendency to panic and a woefully limited skill set, rather than a callous indifference to the interests of the patient.³⁹ Though the stakes may be lower, the father who gets engrossed in playing poker, forgetting that it is his turn to pick up his young daughter from school, arguably has a more deficient character. The self-preference of some agents is rooted and constant. Their neglect of the most basic responsibilities constitutes a threat to their families and associates. Simester’s careful and nuanced arguments convince that certain tokens of inattention arising from self-absorption can be a reliable indicator of bad character. The next challenge, which lies beyond the scope of his essay, is to nail down this form of culpability in terms usable by prosecutors and courts.

Although Williams favored culpability of a subjective kind, he did not concern himself with the question of how many forms of subjective culpability are needed. For Williams, recklessness consisted of the conscious taking of an unwarranted risk of infringing the legally protected interests of others. This conception of recklessness is reestablished in England.⁴⁰ As the entry level form of culpability for serious criminal offenses, recklessness in terms of foresight has a lot to commend it. If D, without a good reason, sets fire to an occupied house in the early hours, aware of the grave danger she will create for the sleeping occupants, clearly she is in the red-zone. If, as in *Hyam*,⁴¹ the fire proves fatal for two sleeping children, some form of homicide conviction is inevitable. Why did she set fire to the house? If she did so in order to kill, then murder. The prosecution accepted that her motivation was to frighten, so arguably then, a case of reckless manslaughter. However, a murder verdict was handed down by the

³⁹ In the leading English case on gross negligence manslaughter, the defendant, an anesthetist, failed to detect a loose connection and spent several frantic minutes looking for the source of the problem. Evidence was given that a competent anesthetist would have fixed the problem within fifteen seconds. Yet he was doing his best. Ensuring that he never set foot in an operating theatre again might have been a better way of dealing with this, rather than sending him to prison for 5 years. *R v. Adomako*, [1995] 1 A.C. 171, 181–82 (H.L.) (appeal taken from Eng.) (U.K.).

⁴⁰ For a time, the failure to think about an obvious risk was accepted as an objective supplement to subjective recklessness, but it has now been dropped. *R v. G*, [2003] UKHL 50, 4 All ER 765, 766 (appeal taken from Eng.) (U.K.).

⁴¹ *Hyam v. DPP*, [1975] 1 A.C. 55, 55 (H.L.) (appeal taken from Eng.) (U.K.).

House of Lords on the basis that foresight of the probability of causing death or serious bodily harm was tantamount to an intention to cause death or serious bodily harm. This started a debate about the meaning of intent in the context of murder, which required three more visits to the House of Lords to resolve.

Williams accepted the terms of this debate without raising the question of whether it was worth having. There is a powerful argument that a unified form of culpability applicable for all serious offenses should be in terms of subjective recklessness.⁴² Williams accepted as a given that certain crimes required proof of intent without querying whether this was useful, which given his utilitarian disposition, is strange. As for Williams' take on intent, in addition to intent in the form of the motivating factors explaining why D did what he did, Williams firmly endorsed the view that any side-effects which D foresaw as virtually certain to be caused by his conduct were outcomes that he intended. Following Bentham, he termed the latter form of intent, "oblique intent," and, like Bentham, did not consider there to be any difference of substance between the two forms of intent.

In his excellent chapter, which revisits the academic and judicial disputes concerning the meaning of intent (including whether the search for its meaning is a hopeless quest), Antony Duff notes that Williams does concede that sometimes oblique intent may not suffice, and that it might be legitimate for a court to insist D must have intent in the full sense of acting in order to bring about the *actus reus* of the offense charged. Williams mentions offenses of causing mental stress, complicity, and treason. (Pp. 151–52.) As Duff notes, this is a surprising concession, given the firmness of his opinion that oblique intent is real intent and not some *ersatz* version. Williams does not say why he allows this possibility, which even for a scholar so averse to theory for theory's sake, is economical.

Duff, in a persuasive account, suggests that an explanation for Williams' concessions (not necessarily the explanation Williams would have given), lies in settling the limits of our responsibilities as conceived under law. (Pp. 169–77.) While, for Duff, there is always responsibility for harms that are directly intended, there are occasions where, in his words, we need not pay "practical attention" to harms we know we will bring about but do not directly intend. Duff's discussion of this responsibility issue has great import for one of Williams' concessions in particular, conduct which causes mental stress. In England, psychiatric injury is now regarded as a form of bodily harm for the purposes of the offenses of maliciously inflicting wounds or bodily harm,⁴³ and for the more serious offense of wounding or causing grievous bodily harm with intent to cause grievous bodily harm.⁴⁴ When extending these offenses to psychiatric injuries, the need for any

⁴² LARRY ALEXANDER, KIMBERLY KESSLER FERZAN, WITH STEPHEN MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 27–29 (2009).

⁴³ Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, § 20 (U.K.).

⁴⁴ *Id.* at § 18.

form of assault and/or percussive force was dropped; neither of these offenses requires anything other than causation with respect to the *actus reus*.⁴⁵

In theory, including psychiatric injury within the terms of these offenses could open up new vistas of liability beyond the harassment cases (incessant silent phone calls, abusive mail, stalking) that prompted this accommodation of psychiatric injury within violent offenses against the person. Suppose D is refereeing a paper written by V for an academic journal. He knows that acceptance of the paper is crucial for V's chances of tenure and knows that V has fragile mental health and may well suffer a breakdown if his post is unconfirmed. D considers the paper to be publishable, but, as he intensely dislikes V and wishes to do him down, he recommends non-publication and no chance of resubmission. In consequence, V's post is unconfirmed and V becomes acutely depressed as D had hoped he would. For various reasons, a prosecution would be unlikely, but a prosecution would be morally justified and, as the law stands now in England, legally feasible. Now, hold everything else constant but make the paper a poor paper, and allow that D is able to land his psychological blow by way of a warranted academic judgment.

Arguably there is no crime on the part of D in the second scenario even if a direct intent to cause mental stress could be proved. If D would have not reviewed V's paper but for the chance to cause him harm, then he reviewed the paper in order to do him harm, even in the case where that was achievable by way of an informed and balanced appraisal. Duff's argument based on responsibility carries further than cases of oblique intent. There will arise many occasions where harm can be caused with impunity even with direct intention by, as it were, playing it by the book. D can open a competing store near to V's store, knowing that his resources and business acumen will bring him profits and cause the collapse of V's business. He is doing this because he wants to make money and to harm V. In the eye of the law, D will be running a lawful business and need not concern himself with the harm his success will cause to his competitors.⁴⁶

II. THE SANCTITY OF LIFE

In 1957, Williams published *The Sanctity of Life and the Criminal Law*, a book on the reform of English Law in the fields of suicide, assisted suicide, euthanasia and abortion. The book was one of the influences on the decriminalization of attempted suicide in England, a change in the law now regarded as uncontroversial by persons of all shades of opinion regarding questions about the meaning and the legal implications of the phrase "the sanctity of life." Williams wanted more than decriminalization: he wanted what some would now call a right to self-determination, a right that could be accessed, should circumstances require, through the assistance of others, whether by means of

⁴⁵ R v. Ireland, [1998] 1 A.C. 147, 147, 151, 159 (appeal taken from Eng.).

⁴⁶ See G.R. Sullivan, *Bad Thoughts and Bad Acts*, 1990 CRIM. L. REV. 559 (1990).

assistance in the process of committing suicide or by way of what he called “consensual homicide.” The proposal is so broad that it continues to startle some fifty seven years after it was made. Providers of assistance in suicide or perpetrators of consensual homicide are not confined to the medical profession. No procedures are laid down. There is no reason whatever to think that his advocacy of this change was in any way flippant or designed to shock. It is made as a short postscript to a chapter where a careful, prudential and compassionate case is made for not prosecuting persons who have attempted suicide—something that was more or less settled practice at the time he was writing. As John Keown observes in his chapter, *Williams versus Kamisar on Euthanasia*, Williams recognized that public opinion was not ready for something so radical. (P. 253.) Williams concluded his chapter with a more limited proposal to permit doctors to perform voluntary euthanasia to end severe pain in cases of terminal illness.

Keown’s revisitation of the debate between Yale Kamisar and Williams provides a convincing refutation of Williams’ claim that his more limited proposal was safe from expansion by way of the slippery slope. Kamisar, writing from a secular-liberal perspective, makes a convincing case that allowing doctors the authority to perform euthanasia, in the circumstances of even Williams’ more modest proposal, could soon expand in practice to cover terminations where the voluntariness of the patient’s involvement would be open to serious question, an estimation vindicated by developments in various countries and a story still unfolding. Williams’ engagement with Kamisar on this issue is unconvincing and not reminiscent of the combat effective Williams, familiar from his frequent engagements with adversaries on points of doctrine. Keown’s verdict that, during this exchange with Kamisar, “his scholarly standards slipped, sometimes precipitously” (P. 273) is severe, but justified.

Why was this? Arguably, Williams was not fully engaged by the debate. In his un-nuanced, utilitarian way, Williams was convinced that the sum of human happiness would be increased if persons who no longer valued their lives were allowed to surrender their lives. Although he acknowledged that young persons in particular might make impetuous decisions, destructive of their potentially valuable lives and the happiness of their parents, as Keown observes, he made no searching examination of whether easy access to medically administered death would, even from a utilitarian perspective, do more harm than good. (P. 251.) His defense against the slippery slope was a half-hearted response to what he saw as cautious, conventional opinion, a response tactically necessary at the time but not, perhaps, in the future.

Williams was prominent in associations formed to advocate legislative reform allowing abortion and euthanasia. Pending legislative changes, he had hopes that some progress might be made judicially by developing the defense of necessity. In her informative chapter, Penney Lewis shows that, save for the complex exception of Holland, attempts by courts to give more scope to doctors in the matter of assisted dying, have foundered on a lack of judicial consensus and an understandable reluctance to step forward where the legislature has been reticent.

Confining attention to Europe, two countries in particular, Switzerland and Belgium, have legislated to give doctors great latitude in assisting death. The same applies in Holland through a combination of the necessity defense, pronouncements by medical bodies, governmental statements, and legislation.

These developments have had a great effect on opinion and practice in the United Kingdom. Williams' reform strategy was gradualist; he hoped that through debate and the powers of persuasion, older ways of thinking based on religion and custom could, over time, be changed for the better, from his perspective. The pressure for change now comes from individuals, many in desperate straits, who want change here and now. They are insisting that they have a human right to live in a dignified way, in circumstances not amounting to inhuman and degrading treatment, and that if their condition cannot be improved, they should be assisted in dying and/or be informed *ex ante* what measures of assistance in dying, taken by doctors, family and friends, would be likely to attract prosecution.⁴⁷

Antje Du Bois Pedain, in her subtle probing of the legal possibilities arising out of the duty-governed relationship of doctor and patient, is alive to the wishes of patients to be ministered by their own doctors in ways that might accommodate a supervised and dignified death. The formal law of England and Wales, which proscribes any and all forms of assistance in suicide, let alone voluntary euthanasia, remains stringent and clear.⁴⁸ Yet the compassionate concern for individuals placed in dire circumstances which animates Pedain's chapter is to be found in the judgments in the recent Supreme Court (U.K.) decision in *Nicklinson*.⁴⁹

The three applicants in *Nicklinson* each suffered complete paralysis entailing total dependence on others for all needs. They were incapable of taking their own lives unassisted. Denial of medical help in committing suicide for persons in the helpless condition of the applicants was found by Baroness Hale and Lord Kerr to

⁴⁷ The terms of the legal debate in the matter of life/death decision-making changed with the incorporation of the European Convention for Human Rights into United Kingdom law, following the Human Rights Act 1998. The articles of the European Convention that are in play in the leading cases of *R (Pretty) v. DPP*, [2002] 1 A.C. 800 (H.L.), *R (Purdy) v. DPP*, [2010] 1 A.C. 345 (H.L.) and *R (Nicklinson) v. Ministry of Justice*, [2014] UKSC 38 (appeal from Eng. & Wales), are: Article 2 (right to life); Article 3 (inhuman and degrading treatment); Article 8 (right to private and family life); and Article 14 (nondiscrimination in the enjoyment of Convention rights and freedoms). Under the terms of the 1998 Act, the common law must be made compatible with Convention rights and legislation must be interpreted, "so far as is possible . . . in a way which is compatible with Convention rights." Human Rights Act, 1998, c. 42, § 3(1) (U.K.). If it is not possible to interpret a legislative provision in a manner compatible with Convention rights, the court must make a "declaration of incompatibility" which places a legal onus on the relevant government department to consider changes to the legislation. *Id.* at § 4. However the government is not obliged under domestic law to make any change. *Id.* at § 4(6)(b).

⁴⁸ The common law of murder allows no leeway to euthanasia and the terms of the Suicide Act, 1961, 9 & 10 Eliz. 2, c. 60, § 2 (U.K.) clearly proscribe encouragement or assistance of suicide in all circumstances. *Id.*

⁴⁹ [2014] UKSC 38.

be in breach of Article 8 (1) of the European Convention for the Protection of Human Rights. Lord Neuberger and Lord Wilson were strongly inclined to that conclusion but considered the time was not yet ripe for a definitive ruling.⁵⁰ Lord Mance was prepared to contemplate the possibility that s.2 of the Suicide Act 1961 was not Convention compliant but considered that parliament was much the best forum to discuss and implement any change in the law. Lord Clarke and Lord Sumption did not rule out any future application to the courts but only if parliament failed to debate the issues arising in *Nicklinson*.⁵¹ Lord Reed and Lord Hughes saw no role for the courts in the matter of assessing the legitimacy of relaxing the current restraints on assistance in dying.

During the hearing of *Nicklinson*, the Director of Public Prosecutions let it be known in open court that personal caregivers who arranged for and medical professionals who provided assistance in suicide for persons in like circumstances to the applicants were “most unlikely” to be prosecuted.⁵² What changes, if any, will be made to the written law of England and Wales relating to assisting suicide is still an open question, but the law in action is now much closer to what Williams wanted.⁵³

⁵⁰ What the four judgments have in common is a conclusion that that the jurisprudence of the European Court of Human Rights regarding Article 8(1) establishes that the right to respect for private and family life includes a liberty to commit suicide, a liberty that should be available to persons incapable of dying without assistance. The terms of s. 2 of the Suicide Act 1961 proscribe all forms of assistance in suicide and therefore cannot be reconciled with this liberty. Lords Neuberger and Wilson stayed their hands in the matter of issuing a declaration of incompatibility because parliament was on the point of debating a bill concerned with assistance in dying. They indicated that the courts would be open to future applicants in like case to the current applicants if parliament declined to make any exceptions to the general proscription on assisting suicide.

⁵¹ The Assisted Dying Bill, which at the time of writing is before parliament deals with patients who are terminally ill and would not cover any of the applicants in *Nicklinson*. Assisted Dying bill, 2014–15, H.L. Bill [6] (Eng.) (Wales). Of course, the terms of the Bill may alter during the legislative process.

⁵² [2014] UKSC 38 at [254]. The Director of Public Prosecutions must give consent to any device. *Purdy*, *supra* note 47. The House of Lords ruled that Article 8(1) of the European Convention for the Protection of Human Rights required the Director to make and publish guidelines, listing those factors which would favour or militate against the prosecution of the offence of assisting and encouraging suicide. The guidelines subsequently published were equivocal about prosecutions against medical professionals who provided assistance in suicide. All of the justices in *Nicklinson* save for Lord Hughes and Lord Reed anticipated that the Director would amend the guidelines to align them with her policy as stated to the court but refrained from making any order to that effect. Of 85 cases referred to the Crown Prosecution Service between 1 April 2009 and 1 October 2013, one referral resulted in a successful prosecution, sixty four were not proceeded with, eleven were withdrawn and nine were on-going at the time of the hearing in *Nicklinson*. [2014] UKSC 38 at [173].

⁵³ Williams would have allowed voluntary euthanasia in addition to assistance in suicide. There is little discussion in *Nicklinson* of the fine lines that may be involved when assessing whether a particular procedure employed to end the life of a person incapable of taking his or her own life unaided is assistance in suicide or euthanasia/mercy killing. In doctrinal terms, the English law of murder does not permit or even mitigate the latter form of intervention: the mandatory life sentence

III. PROFESSING THE CRIMINAL LAW

Tony Smith's concluding chapter looks at the things that Williams did as a law professor—a professor who at the time that Smith was his colleague, was primarily a professor of criminal law. This reflective and insightful chapter stimulates thoughts about what criminal law professors should do today, and to what extent they should try to emulate Williams, insofar as their capacities allow.

Above all, Williams wanted to improve the condition of the criminal law for England and Wales. Aside from his students, he addressed himself to advocates, judges, law reform bodies, legislators and civil servants, and, to an extent, the general public. Although a law professorship was the right job for Williams, it is likely that if his thoughts had not carried beyond the class room and the law journals, he would have done something else. He sought to assist and goad the passing of clearly expressed and consistent legislation and the creation of examined and coherent doctrine. Though learned outside the law, his scholarship was predominantly within the law, in terms of what was to be studied and explicated. The letter of the law was what mattered. Though well known as a utilitarian, there is next to no philosophical theorizing in a utilitarian vein in his work.

Many contemporary scholars of the criminal law would not want to confine themselves to doctrinal scholarship. For those of a critical or post-modern persuasion, the letter of the law is by no means the last word on how cases are decided. And from time to time they are given fish to fry. English appellate criminal courts, for all their talk of strict construction, are prone to disrupt the clearest legislation and most settled doctrine if bad persons are about to escape justice by being charged with the wrong offense⁵⁴ or by some shortfall in the scope of the offense charged.⁵⁵ Sir Roger Toulson, in incisive and measured terms, demonstrates how the predictable and stable doctrine relating to the application of the joint enterprise doctrine in murder cases (a doctrine which limited convictions to manslaughter when a culpability approximate to the culpability of a perpetrator

applies. *Nicklinson* is a case about assisted suicide. Lord Neuberger made reference to a device that is loaded with a lethal drug which can be self-administered via an eye blink computer by using a pass phrase. *Id.* at [4]. He considered that resort to such a device would be a case of suicide. *Id.* at [92]–[95]. This was also the opinion of Lady Hale. *Id.* at [318]. Lord Sumption thought there was no difference in moral substance between the use of such devices and direct administration of the lethal drug. *Id.* at [227]. This view was also expressed in forceful terms by Lord Kerr. *Id.* at [358]–[360].

⁵⁴ For instance, the House of Lords, by a majority in *DPP v. Gomez*, [1993] 1 A.C. 442 (H.L.) (appeal taken from Eng.), confirmed a conviction for theft on facts where it was obvious that the charge should have been obtaining property by deception, thereby distorting the clear terms of section 1 of the Theft Act of 1968. The dissenting opinions are doctrinally compelling.

⁵⁵ In *R v. Hinks*, [2001] 2 A.C. 241 (H.L.) (appeal taken from Eng.), the House of Lords confirmed a conviction for theft where D received gifts of money from V in circumstances where she obtained a valid title to the money. This was no barrier to the confirmation of the conviction as, apparently, the criminal law has its own conception of property, which may differ from the civil law. The dissenting opinions are wholly convincing.

could not be proved against a particular defendant), was incrementally changed in a series of cases to allow murder verdicts on a wider basis. Sir Roger, it is surmised, would fight bad doctrine with better doctrine, but would not venture out of the doctrinal domain in arguing the case for doing so, as would also have been the case with Williams. By contrast, a critical theorist would likely argue that any change would not hinge on doctrinal argument, but would happen only if the underlying social and political circumstances favored a reversion to the more measured approach. At the other end of the spectrum from the critical theorists, retributivist theorists would insist, before advocating any change in doctrine, that there should be a theorized account of why the old doctrine was morally good, if it turns out on deep reflection, to be morally good, and why the current doctrine is morally bad if it turns out to be morally bad. Only then are you ready to advocate particular doctrinal changes if minded to do so.

Critical theorists and retributivist criminal law theorists are here to stay in Anglo-American law schools and so too other theorists of different stripes. In England, non-theoretical doctrinalists are getting thinner on the ground, and tend to be of a certain age. As the career of Glanville Williams demonstrates, doctrinal scholarship of the highest order can make a difference to adjudication, and the form and content of legislation, and is more likely to make a difference in these spheres than other forms of legal scholarship. And lesser doctrinal scholars than Williams can make their mark in this way, too. And for law schools, with their distinctive features and various roles, that should matter. The very best legal scholarship offers far more than doctrinal scholarship. Works like *The Concept of Law* and *Law's Empire* are read from cover to cover. The fate of large doctrinal works, however expert and well written, is to be consulted. Yet doctrinal scholarship should have its place in the sun in modern law schools, alongside everything else.

